

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

IN RE PHARMACEUTICAL INDUSTRY
AVERAGE WHOLESAL PRICE
LITIGATION

THIS DOCUMENT RELATES TO ALL
CLASS ACTIONS

MDL No. 1456

CIVIL ACTION: 01-CV-12257-PBS

Judge Patti B. Saris

**LEAD COUNSEL'S REPLY TO DEFENDANT TAP PHARMACEUTICAL
PRODUCTS INC.'S MOTION FOR PROTECTIVE ORDER**

Lead counsel in the above-captioned matter hereby respond to Defendant Tap Pharmaceutical Products Inc.'s Motion for a Protective Order seeking to quash the notices of deposition issued by counsel in the tag along action *Robert J. Swanston v. TAP Pharmaceutical Products, Inc., et al.* ("Swanston"), which includes the deposition of TAP's lead counsel Daniel E. Reidy. Since Lead Counsel were not consulted concerning this discovery and did not authorize it, and since the discovery violates this Court's prior orders, it should be stricken at this time.

On June 14, 2002 this Court issued Case Management Order No. 1 ("CMO No. 1") which set forth procedures for the orderly coordination and efficient prosecution of the numerous cases within MDL 1456, including later filed tag-along actions. For the Court's convenience, a copy of CMO No. 1 is attached hereto as Exhibit A. CMO No. 1 provides for the efficient prosecution of MDL 1456 and appointed Co-Lead and Liaison Counsel as well as members of a Lead Counsel Committee to prosecute and organize the litigation on behalf of the purported class of plaintiffs in MDL 1456. See CMO No. 1 at

¶9.¹ CMO No. 1 also includes specific language concerning the coordination of discovery. Paragraph 12 of CMO No. 1 specifically states:

“The Lead Counsel Committee shall have *sole* authority over the following matters on behalf of Class Plaintiffs..... the scope, order and conduct of all discovery proceedings.” (emphasis added).

The purpose of this provision is to ensure judicial economy and avoid duplication of effort. See *Annotated Manual for Complex Litigation* (3rd), §§ 20.221, 20.222. No counsel has objected to the provisions of CMO No. 1 and all counsel in each of the class action cases transferred to MDL 1456 have abided by its terms – except for counsel in *Swanston*. To allow every lawyer in each tag-along action to follow their own discovery plan would contravene the purpose of CMO No. 1 and cause a substantial amount of duplication of work for the parties and the Court. Therefore, only Lead Counsel can control the timing and scope of discovery in this action.

As this Court is aware, Lead Counsel have been actively pursuing discovery in this case including, *inter alia*, obtaining an Order from the Court requiring Defendants to provide documents previously provided in similar litigation or previously produced to any government entity,² obtaining an Order requiring Defendants to supplement this production with documents provided to House Energy and Commerce Committee,³ and seeking additional discovery on actual transaction prices in connection with Plaintiffs’ Opposition to Motions to Dismiss the Amended Master Consolidated Complaint.⁴ In addition, with respect to some Defendants, Lead counsel have reached agreement on the

¹ The provisions of CMO No. 1 appointing Lead Counsel were modified slightly by CMO No. 3.

² See Paragraph 2 of CMO No. 5, dated October 28, 2002.

³ See Section II, Paragraph 3 of CMO No. 7, dated August 7, 2003.

⁴ See Plaintiffs’ Motion for Additional Limited discovery filed September 15, 2003.

scope of discovery prior to a decision on the Motions to Dismiss and are currently proceeding with such discovery. Thus, Lead Counsel have been diligently pursuing discovery and have endeavored to do so in the most efficient manner possible.

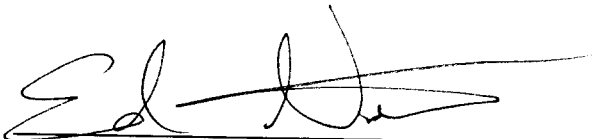
On June 13, 2003, the Judicial Panel on Multidistrict Litigation issued a Transfer Order transferring the *Swanston* matter to this Court for consolidation with MDL 1456.

On September 17, 2003, without any consultation, approval from or even notice to Lead Counsel, and in contravention of all previous Orders of this Court as well as agreements reached between Lead Counsel and counsel for the all of the Defendants in this action, counsel in *Swanston* served several deposition notices to employees of TAP Pharmaceuticals, including their current counsel Daniel E. Reidy. Lead Counsel do not, at this time, see any need to take the deposition of counsel for TAP. In the opinion of Lead Counsel the deposition notices issued by counsel for *Swanston* do not aid the class and are in fact counter productive at this time.

By virtue of their appointment as Lead Counsel by the Court, Lead Counsel, not counsel for *Swanston*, has the sole authority over the serving of discovery related to all class action cases consolidated into MDL 1456, including *Swanston*. The deposition notices issued by counsel for *Swantson* violate CMO No. 1 as well as the other discovery orders issued and therefore should be stricken.

DATED: September 26, 2003

By



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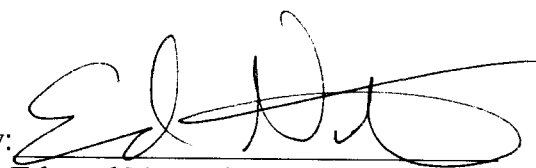
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Fax: 903-792-5098; 903-794-5098

**ADDITIONAL ATTORNEYS
FOR PLAINTIFFS**

CERTIFICATE OF SERVICE

I hereby certify that I, Edward Notargiacomo, an attorney, caused true and correct copies of the foregoing Lead Counsel's Reply To Defendant Tap Pharmaceutical Products Inc.'s Motion For Protective Order, to be served on all counsel of record electronically, pursuant to Section D of Case Management Order No. 2., this 26th day of September, 2003.

By:

A handwritten signature in black ink, appearing to read 'Ed Notargiacomo', written over a horizontal line.

Edward Notargiacomo, Esq.
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6/10/02

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN RE PHARMACEUTICAL INDUSTRY
AVERAGE WHOLESALE PRICE
LITIGATION

MDL 1456

Master File No. 01-CV-12257-PBS

Judge Patti B. Saris

THIS DOCUMENT RELATES TO:

ALL ACTIONS

[PROPOSED] CASE MANAGEMENT ORDER NO 1

WHEREAS, on April 30, 2002 the Judicial Panel on Multidistrict Litigation (the "Judicial Panel") issued an order pursuant to 28 U.S.C. § 1407 transferring fifteen actions to the District of Massachusetts for coordinated or consolidated pre-trial proceedings;

WHEREAS, various parties have notified the Judicial Panel of the existence of numerous additional Tag-Along Actions for which they seek transfer to this Court and coordination with the coordinated or consolidated cases;

WHEREAS, the Judicial Panel's order of April 30, 2002 provided that the transferred cases be captioned In re: Pharmaceutical Industry Average Wholesale Price Litigation and be given the designation MDL 1456;

WHEREAS, by Order dated May 16, 2002, this Court consolidated these cases under the caption for the lead case, Citizens for Consumer Justice, et al, v. Abbott Laboratories, et al., C.A. No. 01-12257-PBS (the "Consolidated Actions") and scheduled an initial status conference on July 17, 2002;

DOCKETED
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WHEREAS, counsel for plaintiffs in Citizens for Consumer Justice, et al. v. Abbott Laboratories et al., CA No. 01-12257-PBS represent that they have contacted all plaintiffs' counsel and conducted a meeting to discuss the efficient prosecution of this litigation. Plaintiffs' counsel represents that all counsel were invited to attend in person or to participate via telephone conferencing and that various attorneys participated both in person and by telephone, others did not. Plaintiffs' counsel represent that counsel unavailable for the meeting were contacted to discuss their participation in the prosecution of this Action; and

WHEREAS plaintiffs have informed defendants that they anticipate requesting consent or moving for leave to file a consolidated amended complaint or complaints; and

WHEREAS all of the defendants wish to be relieved of the expense and burden of responding to existing complaints until such time as the Court determines how future pleadings should proceed; and

WHEREAS counsel for the plaintiffs and counsel for the defendants have begun preliminary discussions about initial case management issues and wish to proceed in an expeditious and efficient manner and preserve judicial resources; and

WHEREAS, in order to promote judicial economy and avoid duplication, the Court finds that it would be appropriate to provide procedures for coordination of the Consolidated Actions and for an organization of Plaintiffs' counsel to coordinate the efforts of counsel in these actions. Accordingly,

IT IS HEREBY ORDERED as follows:

I. MASTER DOCKET, MASTER FILE AND SEPARATE ACTION DOCKETS

1. A Master Docket and a Master File are hereby established for this and all related cases subsequently filed in or transferred to this Court. Entries in said Master Docket shall be applicable to these Consolidated Actions as more fully set forth below. Separate dockets

shall also be maintained for each related case currently pending, subsequently filed in or transferred to this Court, and entries shall be made therein in accordance with the regular procedures of the Clerk of this Court, except as modified by this Order or a future order of this Court.

2. When a pleading or other court paper is filed and the caption, pursuant to paragraph 8, *infra*, shows that it is to be applicable to "All Actions," the Clerk shall file such pleading or other court paper in the Master File and note such filing in the Master Docket. No further copies need be filed nor docket entries made.

3. When a pleading or other court paper is filed and the caption, pursuant to paragraph 8, *infra*, shows that it is applicable to fewer than all actions before this Court as part of MDL 1456, the Clerk need file such pleading or other court paper only in the Master File, but nonetheless shall note such filing in both the Master Docket and in the docket of each such action.

II. NEWLY FILED OR TRANSFERRED ACTIONS

4. When a case which relates to the subject matter of these Consolidated Actions is hereafter filed in this Court or transferred here from another court, the Clerk of this Court shall:

- a. Make an appropriate entry in the Master Docket;
- b. Place a copy of this Order in the separate file for such action;
- c. Mail a copy of this Order to the attorney(s) for the Plaintiff(s) in the newly filed or transferred case and to the attorneys for any new Defendant(s) in the newly filed or transferred case; and

d. Mail a copy of the Order of assignment to counsel for Plaintiffs and to counsel for Defendant(s) in the Consolidated Actions.

5. This Court requests the assistance of counsel in calling to the attention of the Clerk of this Court the filing or transfer of any case which might properly be consolidated or coordinated with In re Pharmaceutical Industry Average Wholesale Price Litigation, MDL No. 1456.

6. This Order shall apply to each case subsequently filed in this Court or transferred to this Court unless a party objecting to the coordination or consolidation of such case or to any other provision of this Order shall, within twenty-one (21) days after the date upon which a copy of this Order is mailed to counsel for such party, file an application for relief from this Order or any provision herein and this Court deems it appropriate to grant such application.

III. CAPTION OF CASES

7. Every pleading filed in this proceeding, or in any separate action included herein, shall bear the following caption:

IN RE PHARMACEUTICAL INDUSTRY
AVERAGE WHOLESALE PRICE
LITIGATION

MDL 1456

Master File No. 01-CV-12257-PBS

Judge Patti B. Saris

THIS DOCUMENT RELATES TO:

8. When a pleading or other court paper is intended to be applicable to all actions, the words "All Actions" shall appear immediately after the words "THIS DOCUMENT

RELATES TO:" in the caption set out above. When a pleading or other court paper is intended to be applicable only to one, or some, but not all of such actions, the party filing the document shall indicate the action(s) to which the document is intended to be applicable by indicating the last name of the named plaintiff(s) and the docket number(s).

IV. ORGANIZATION OF PLAINTIFFS' COUNSEL

9. The Court designates the following firms to act on behalf of all Plaintiffs with responsibilities hereinafter described:

a. As Liaison Counsel:

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b. As Chairs of Lead Counsel Committee:

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c. As Lead Counsel Committee:

Chairs of Lead Counsel Committee listed in paragraph 11(b) above

and the following:

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10. Liaison Counsel shall be responsible for ensuring that orders of the Court are served on all Plaintiffs' counsel in each case; communicating with the Court on behalf of all

Plaintiffs' counsel in each case as to scheduling and organizational matters; and for maintaining a master service list of all Plaintiffs and their respective counsel.

11. The Chairs of the Lead Counsel Committee shall have the authority and responsibility for the day-to-day management of the interests of the Class Plaintiffs in the litigation, and shall call meetings and otherwise manage the work at the Lead Counsel Committee.

12. The Lead Counsel Committee shall have sole authority over the following matters on behalf of Class Plaintiffs (a) the initiation, response, scheduling, briefing and argument of all motions; (b) the scope, order and conduct of all discovery proceedings; (c) such work assignments to other Plaintiffs' counsel as they may deem appropriate; (d) the retention of experts; (e) designation of which attorneys may appear at hearings and conferences with the Court; (f) the timing and substance of any settlement negotiations with Defendants; and (g) other matters concerning the prosecution or resolution of their respective cases. The Lead Counsel Committee shall have responsibility for major decisions on behalf of Plaintiffs' counsel regarding the overall prosecution of the Consolidated Actions and shall be responsible for the establishment of working committees for the efficient prosecution of the litigation and the appointment of chair persons and members of such committees.

13. No motion shall be initiated or filed on behalf of any Class Plaintiff except through the Chairs of the Lead Counsel Committee.

14. The Lead Counsel Committee shall have sole authority to communicate with Defendants' counsel and the Court on behalf of all class Plaintiffs, unless that authority is expressly delegated to other counsel. Defendants' counsel may rely on all agreements made with

the Chairs of the Lead Counsel Committee, and such agreements shall be binding on all other class Plaintiffs' counsel in their respective cases.

15. Defendants shall effect service of papers on Plaintiffs by serving a copy of the paper by overnight mail service, telecopy or hand delivery on Liaison Counsel and each Chair of the Lead Counsel Committee. Liaison Counsel shall effect service on all other Plaintiffs' counsel by first class United States mail. Plaintiffs shall effect service of papers on Defendants by serving a copy of the paper by overnight mail service, telecopy or hand delivery on counsel for Defendants. This Court's Master Service List shall govern in all proceedings.

V. ADMISSION OF ATTORNEYS

16. Each attorney not a member of the Bar of this Court who is acting as counsel for a Plaintiff or Defendant herein and who is in good standing in any district court of the United States shall be deemed admitted *pro hac vice* to practice before this Court in connection with this action upon payment of the appropriate filing fee.

VI. RESPONSE TO ORIGINAL COMPLAINTS AND INITIAL DISCOVERY OBLIGATIONS

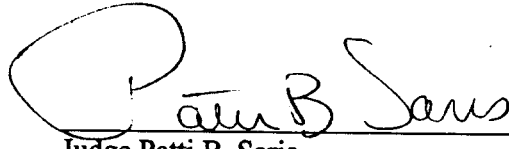
17. Defendants are relieved of their obligations to respond to: (1) any of the complaints that are included within MDL 1456 as reflected on Schedule D attached to the April 30, 2002 Order of the Judicial Panel for Multidistrict Litigation in In re Pharmaceutical Industry Average Wholesale Price Litigation; and (2) complaints in any tag-along actions where transfer to this Court for coordinated pre-trial proceedings with those cases currently included within MDL 1456 is not opposed, until further order of this Court.

18. With respect to any complaint as to which the obligation to respond has been stayed in paragraph 17 above, Plaintiffs and Defendants are relieved of the obligation to provide any discovery, including F.R.Civ.P. 26(a) disclosures, until after entry of an order setting a

discovery schedule or as otherwise agreed upon by the parties.

Dated: June 14, 2002

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Judge Patti B. Saris

Case: 1:01-cv-12257

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September 26, 2003

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Re: In Re: Pharmaceutical Industry Average Wholesale Price Litigation, MDL
No. 1456

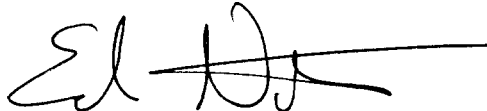
Dear Sir/Madam:

Enclosed for filing in the above-captioned matter please find the following document:

1. Lead Counsel's Reply to Defendant TAP Pharmaceutical Products Inc.'s Motion for Protective Order.

Please acknowledge this filing by date-stamping the enclosed copy of this letter and returning it to the waiting messenger. Thank you.

Very truly yours,



Edward Notargiacomo

Enclosure

cc: All counsel of record (Via VeriLaw)